Lipo Corp Bhd v Mahkamah Perusahaan Malaysia & Anor

HIGH COURT (PULAU PINANG) — APPLICATION FOR JUDICIAL REVIEW NO 25–9–01 OF 2012
VARGHESE GEORGE J
30 NOVEMBER 2012

Administrative Law — Judicial review — Application for — Review of decision of chairman of Industrial Court — Whether chairman erred in finding that second respondent's resignation amounted to forced resignation — Whether process by which chairman came to his conclusions tainted by any irrationality or procedural impropriety such as to entitle applicant to quash award — Whether chairman exceeded his jurisdiction in issuing award — Certiorari — Whether order for certiorari ought to be granted

The second respondent was at all material times the Vice President Operations (components) of Lipo Corp Bhd ('the applicant'). The second respondent alleged that he was forced to resign by the CEO of the applicant and that accordingly he was unfairly dismissed without just cause and excuse. The second respondent's complaint was referred by the Minister to the Industrial Court ('IC'). Before the IC the second respondent testified that after a meeting with the CEO of the applicant company and in the presence of the human resource manager, he was instructed to tender his letter of resignation within 24 hours. As such, the second respondent had contended that his resignation was not voluntary. The applicant's version was that it had come to its knowledge that the second respondent had in conflict of his express, implied or fiduciary duties to the applicant employer entered into separate business deals with a prospective customer of the applicant with the intention of channeling business away from the applicant. The CEO thus claimed that at the meeting with the second respondent he had reminded the latter that to avoid embarrassment and conflict of interest the latter ought to leave his employment with the applicant or face a domestic enquiry where charges would be proffered against him. It was therefore the applicant's stance that the 'resignation' was submitted voluntarily without force. The chairman of the IC found the second respondent's version more probable compared to the applicant's version. As such, the chairman held that the second respondent's resignation amounted to a forced resignation and in consequence the dismissal without just cause and excuse. The IC thus ordered that the second respondent be reinstated to his previous position in the applicant's service without loss of benefits, security or privileges with 24 months backwages, less EPF deductions. The applicant has by way of this judicial review application sought to quash the IC award. The applicant submitted that the chairman had erred in concluding that the second respondent's resignation was not made voluntarily; that the chairman had

failed to embark upon a determination as to whether there was misconduct after having decided that the resignation was not made voluntarily; that the chairman had exceeded the terms of reference when he dealt with the second respondent's complaint as if it were a constructive dismissal case.

Held, dismissing the application with costs:

(1) It was obvious that the conclusion of the chairman was made on evidence that was before the IC and not capriciously. As such, there was no need to delve into the sufficiency or adequacy of the evidence or determine whether the decision was fair or reasonable. Further, the chairman had not ignored the right test or considerations to be applied in determining the issue as to the voluntariness of the disputed 'resignation'. In addition the chairman had identified and applied the principle of causation correctly to find that the impugned 'resignation' was a direct result of a threat against the employee. Obviously in this case, the threat was undisputedly 'resign or face a domestic enquiry and be embarrassed' and this threat was directly preceded by the 'forced resignation'. The evidence also pointed to a 'rushed' scenario where the employer was left with no option but to resign. The second respondent's letter of resignation itself expressly qualified that it was being handed in at the request of the CEO. Thus, there were no grounds to default the chairman on his conclusion on the issue as to whether the second respondent's resignation was voluntarily made (see paras 14–18).

(2) In the light of the direct acknowledgment by the CEO that there was no intention to institute disciplinary inquiry proceedings against the second respondent and from the concession made to reinstate the second respondent to his previous position, the applicant employer was conceding that the second respondent's dismissal was without just cause and excuse. In the circumstances, it was not necessary for the IC to rule that there was any misconduct on the part of the second respondent, especially since the applicant had chosen to abandon the line of attack that there was misconduct on the part of the employee which warranted dismissal. Thus, the process by which the chairman came to his conclusions was not tainted by any irrationality or procedural impropriety such as to entitle the applicant to quash the award (see paras 22–24 & 28).

(3) The applicant's contention that the chairman had exceeded his jurisdiction in issuing the award was wholly misconceived and devoid of any merit (see para 27).

[Bahasa Malaysia summary

Responden kedua pada masa matan merupakan Naib President Operasi (komponen) Lipo Corp Bhd ('pemohon tersebut'). Responden kedua

mendakwa bahawa dia telah dipaksa untuk meletak jawatan oleh KPE pemohon dan bahawa berikutannya dia dengan tidak adil telah dilucut jawatan tanpa sebab atau alasan adil. Aduan responden kedua telah dirujukkan oleh Menteri kepada Mahkamah Perusahaan ('MP'). Di hadapan MP responden kedua telah memberikan kenyataan bahawa selepas mesyuarat dengan KPE syarikat pemohon dan dalam kehadiran pengurus sumber manusia, dia telah diarahkan untuk memberi surat perletakan jawatan dalam masa 24 jam. Oleh demikan, responden kedua telah berhujah bahawa perletakan jawatannya adalah dengan tidak sukarela. Versi pemohon adalah bahawa ia telah mendapat tahu bahawa responden kedua telah bercanggah dengan kewajipan nyata, tersirat dan fidusiarinya kepada majikan pemohon memeterai urusan perniagaan berasingan dengan bakal pelanggan pemohon dengan niat untuk mencuri perniagaan daripada pemohon. KPE justeru mendakwa bahawa dalam mesyuarat dengan responden kedua dia telah mengingatkan responden kedua untuk menghindari rasa malu dan konflik kepentingan, dia seharusnya meninggalkan pekerjaannya dengan pemohon atau berdepan dengan siasatan domestik di mana tuduhan akan ditawarkan terhadapnya. Justeru adalah menjadi pegangan pemohon bahawa 'resignation' telah diberikan secara sukarela tanpa paksaan. Pengerusi MP mendapati bahawa versi responden kedua adalah lebih berkemungkinan berbanding dengan versi pemohon. Oleh itu, pengerusi memutuskan bahawa perletakan jawatan responden kedua membentuk perletakan secara paksaan dan akibatnya pelucutan adalah tanpa sebab dan alasan adil. MP justeru mengarahkan bahawa responden kedua dikembalikan kepada jawatan sebelumnya di dalam khidmat pemohon tanpa kehilangan faedah, jaminan atau kepentingan bersama gaji tertunggak selama 24 bulan, dengan potongan EPF. Pemohon telah melalui permohonan semakan kehakiman memohon untuk melucut award MP. Pemohon berhujah bahawa pengerusi telah khilaf dalam memutuskan bahawa perletakan jawatan responden kedua tidak dilakukan dengan sukarela; bahawa pengerusi telah gagal untuk memulakan penentuan sama ada terdapat salah laku selepas memutuskan bahawa selepas memutuskan bahawa perletakan jawatan adalah tidak secara sukarela, bahawa pengerusi telah melangkaui terma rujukan apabila dia berurusan dengan aduan responden kedua seperti ia merupakan kes pelucutan konstruktif.

Diputuskan, menolak permohonan dengan kos:

(1) Adalah jelas bahawa kesimpulan pengerusi telah dibuat berdasarkan keterangan di hadapan MP dan bukan dengan sewenang-wenangnya. Justeru, tiada keperluan untuk menyelidik sama ada keterangan adalah mencukupi atau memuaskan atau menentukan sama ada keputusan adalah adil atau berpatutan. Selanjutnya, pengerusi tidak mengendahkan ujian yang wajar atau balasan yang perlu digunapakai dalam menentukan isu tersebut mengenai kesukarelaan 'resignation' yang dipertikaikan. Tambahan pengerusi telah mengenal pasti dan mengunapakai prinsip

penyebab dengan betul untuk mendapati bahawa 'resignation' yang dipertikaikan adalah kesan langsung anacaman terhadap pekerja. Dengan jelas dalam kes ini, ancaman tersebut adalah 'resign or face a domestic enquiry and be embarrassed' yang tidak dipertikaikan dan ancaman tersebut secara langsung diikuti oleh 'forced resignation'. Keterangan juga menunjukkan senario yang 'rushed' di mana majikan tiada pilihan tetapi untuk meletak jawatan. Surat perletakan jawatan responden kedua dengan sendiri secara langsung bersyarat bahawa ia diserahkan atas permintaan KPE. Justeru, tiada alasan untuk mencari kesalahan pengerusi berkenaan dengan keputusannya mengenai isu sama ada perletakan jawatan responden kedua adalah dilakukan dengan sukarela (lihat perenggan 14–18).

(2) Melihatkan pengakuan terus oleh KPE bahawa tidak terdapat niat untuk memulakan prosiding-prosiding siasatan disiplin terhadap responden kedua dan daripada kompromi yang dibuat untuk mengembalikan responden kedua ke jawatan sebelumnya, majikan pemohon telah berserah bahawa pelucutan responden kedua adalah tanpa sebab dan alasan adil. Dalam keadaan ini, adalah tidak perlu bagi MP untuk memutuskan bahawa terdapat sebarang salah laku di pihak responden kedua, terutamanya memandangkan permohon telah memilih untuk meninggalkan line of attack bahawa terdapat salah laku di pihak pekerja yang mana membawa kepada pelucutan. Justeru, proses di mana pengerusi membuat kesimpualan adalah tidak tercemar oleh sebarang ketidakmunasabahan atau prosedur yang tidak betul yang mana membolehkan pemohon untuk melucutkan award (lihat perenggan 22–24 & 28).

(3) Hujahan pemohon bahawa pengerusi telah mejangkaui bidang kuasanya dalam membuat award adalah secara keseluruhannya disalah tanggap dan tidak mempunyai sebarang merit (lihat perenggan 27).]

Notes

For cases on application for judicial review, see 1(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 278–320.

Cases referred to

Food Specialties (M) Sdn Bhd v M Halim Manaf [1992] 2 ILR 311, IC (refd)

Harpers Trading (M) Sdn Bhd Butterworth v Kesatuan Kebangsaan Pekerja-Pekerja Perdagangan [1988] 2 ILR 314, IC (refd)

Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers [1991] 1 MLJ 417; [1991] 2 CLJ 881; [1991] I CLJ (Rep) 159, SC (refd)

Malayan Banking v Chan Hock Low [2007] 4 ILR 203, IC (refd)

Menara PanGlobal Sdn Bhd v Arokianathan a/l Sivapiragasam [2006] 3 MLJ 493; [2006] 2 CLJ 501, CA (refd)

Omron Electronic Sales and Services Sdn Bhd v Phoon Wai Kit & Anor [2010] 7 CLJ 372, HC (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] I CLJ 147, FC (refd)
Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)
Sheila a/p Sangar v Proton Edar Sdn Bhd & Anor [2009] 4 MLJ 285; [2009] 8 CLJ 200, HC (refd)
Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317; [1995] 2 CLJ 748, CA (refd)
Weltex Knitwear Industries Sdn Bhd v Law Kar Toy & Anor [1998] 7 MLJ 359, HC (refd)
Wong Chee Hong v Cathay Organisation (M) Sdn Bhd [1988] 1 MLJ 92; [1988] 1 CLJ 298, SC (refd)

TF Leow (TF Leow & Associates) for the applicant.
Palani (B Dhana with him) (Palani) for the second respondent.

Varghese George J:

[1] The applicant in this judicial review application sought to quash the Industrial Court Award No 1793 of 2011 in Industrial Court Case No 9/4–2268 of 2006 ('award'). The applicant was the employer of the second respondent and the proceedings at the Industrial Court was in respect of a complaint by the second respondent that he had been dismissed without just cause and excuse by the applicant.

The learned chairman of the Industrial Court ('LCIC') in the impugned award had ordered that the second respondent be reinstated to his previous position in the applicant's service without loss of benefits, security or privileges and further that the applicant pay the second respondent the maximum of 24 months backwages (subject to deductions for EPF).

[2] For convenience of reference and identification, the applicant is referred to as the 'employer' and the second respondent as the 'employee', in this ground of decision.

BACKGROUND

[3] The employee commenced his service with the employer on 1 September 2004 in the position of group operation manager. With effect from 1 June 2005 the employee was redesignated as Vice-President Operations (components). Sometime in March 2005 the employee had been included in a Penang State Trade Mission to USA to explore business opportunities and identify potential customers for the employer.

[4] On 30 September 2005 the employee had been called in by the CEO of the employer (Dato' Koay Hean Eng; witness — COW3) and pursuant to discussions between them, the employee went on to on the same day (30 September 2005) at 7.20pm submit a 'letter of resignation'. The material part of the contents of that letter was as follows:

> I as name and address above would like to tender my resignation letter as per requested by Dato' with immediate effect starting from 30 September 2005. No reason was given for this request.

[5] The employee's allegation was that he was forced to resign and accordingly he was unfairly dismissed without just cause and excuse. In support of this claim the employee stated that after the meeting with COW3, (during which COW2; Ms Chan, the human resources manager of employer was also present) he was accompanied to his room by COW2 to type out the said letter. COW2 had waited outside his room to collect the letter which was handed over to her at 7.20pm.

[6] The employer's version was that after the employee's return from USA, there was a 'potential customer' who had arrived in Penang and after meeting COW3, the employee had taken this 'customer' to meet other companies, at the expense of the employer. It was also claimed that it had come to the knowledge of the employer subsequently that the employee had in conflict of his express, implied or fiduciary duties to the employer entered into separate business deals with that 'prospective customer' of the employer who had come from USA and to that end the employee had set up a Malaysian company, to channel business away from the employer.

[7] The CEO of the employer (COW3) claimed that he had on 30 September 2005 at the said meeting only reminded the employee that if the employee was minded to pursue his business, then to avoid embarrassment and conflict of interest, the employee should leave the employer. It was also admitted by the CEO (see also pleadings) that he had said to the employee that the other option would be for the employee to face a domestic enquiry where charges would be proffered against the employee.

In such circumstances, it was the employer's stance that the 'resignation' was submitted willingly and without force. Alternatively, it was contended for the employer that there was in any event a case for 'misconduct' to be held against the employee in the stated circumstances.

[8] LCIC after having heard and discussed evidence adduced by both parties at material parts of the award observed as follows:

The Claimant's resignation letter dated 30th September 2005 clearly stated that the letter was given based on the instruction by COW-3 and no reason was given for this request. It is clear implication that the letter is not voluntary. In this case the Company did not dispute the contents immediately after it was brought to their attention on 30th. September or 4th. October 2005

…

…

There were two conflicting testimonies of the COW-2, COWS and the Claimant. This Court finds that the Claimant's version is more probable compared to the Company's version. Therefore this Court holds that on balance of probabilities the Claimant had succeeded to establish his case. The Court finds that the letter or resignation dated 30th September 2005 was not volunteer but due to the pressure and threat imposed on him by COW-3.

…

…

As such the resignation would amount to forced resignation and on consequence thereto a dismissal without just cause and excuse.

Remedy

In the circumstances of this case this Court (was) satisfied that this is a fit case for reinstatement and compensation in lieu would not be an appropriate remedy.

The company has agreed for the reinstatement of the claimant through the testimony of COW-3, who is the CEO of the company.

LAW ON JUDICIAL REVIEW

[9] It was settled law that in dealing with cases brought before the High Court pursuant to the court's judicial review jurisdiction, the court was not sitting in appeal against the impugned decision or administrative order (in this case against the award of the LCIC) but only exercising the court's supervisory powers over subordinate tribunals. To merit curial intervention therefore the applicant concerned had to establish that 'errors' had been committed in the decision making process (in contrast to an assessment of the merits, substance or justification behind the decision or orders itself). 'Errors' that would call for the court's intervention would be those that was on account of 'illegality', 'irrationality' or procedural impropriety obvious from the records to have been committed in coming to that decision. *(R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] I CLJ 147 (FC); *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317; [1995] 2 CLJ 748 (CA); *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629).

In *Sheila a/p Sangar v Proton Edar Sdn Bhd & Anor* [2009] 4 MLJ 285; [2009]

8 CLJ 200 — Mohamed Arif JC (as he then was) has succinctly captured the approach to be taken by the court when dealing with an application for judicial review, in the following helpful passage:

> If I am to accede to the applicant's argument, it will mean this court will be investigating the merits or justification of the decision on the basis of facts and evidence found by the tribunal. This is in essence an invitation to this court to exercise appellate powers, not judicial review jurisdiction. As I have indicated earlier, the *first* principle in judicial review is that review is concerned with the decision-making process, not the merits, substance or justification. The *second* principle is that there can be an exception to this first principle where the court can examine the substance or justification to satisfy itself that the decision maker has not transgressed the principles of procedural impropriety, illegality or irrationality (with a possible third principle, proportionality).

[10] In *Menara PanGlobal Sdn Bhd v Arokianathan a/l Sivapiragasam* [2006] 3 MLJ 493; [2006] 2 CLJ 501, the Court of Appeal had cautioned and set down the parameters or extent of the allowed intervention by a judicial review court in the following terms:

> If there is *some evidence* to support a finding of fact, it is not then for the courts to go into the sufficiency or adequacy of the evidence. It is not the court's function to review, reassess, reappreciate or reappraise the evidence, or draw its own inferences as to facts from the evidence. The court has to take the evidence as it stands and not go into the questions of its reliability …

The weighing and assessing of the evidence of witnesses, in the case of proceedings before the Industrial Court, was therefore the function of that court and not of the High Court in a judicial review application.

[11] Intervention on the grounds of illegality or irrationality (or perversity) in the findings can be availed of where it was shown to the court that there was no evidence whatsoever to support the finding, or if the conclusions recorded were diametrically contrary to evidence on record. There would also be a case for intervention if it was shown that the decision maker had asked himself the wrong question or had omitted to take into account relevant consideration and to the contrary had taken into account irrelevant consideration or had misconstrued provision of relevant statute or principles of law in coming to the conclusion he reached.

Similar consideration as aforesaid also applied where the challenge was on finding of facts by the Industrial Court which was based on credibility of witnesses (that is such findings were amenable to curial intervention only on the same principles of transgressions by the decision maker on the grounds of illegality and/or irrationality (*Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629).

It was not the function of the High Court in exercise of its supervisory

jurisdiction to hear a dispute 'de novo' and decide on its merits in any case. (*Harpers Trading (M) Sdn Bhd v NUCW* [1991] 1 MLJ 417; [1991] 2 CLJ 881; [1991] I CLJ (Rep) 159).

EMPLOYER'S GROUNDS TO QUASH THE AWARD

[12] The employer's case before the court was argued under the following three broad heads leveled against the LCIC's award:

(a) the conclusion reached by LCIC that the employee's resignation on 30 September 2005 was not made voluntarily, was incorrect and erroneous and disregarded principles of law laid down for such determination;

(b) after having decided that the employee's resignation was obtained by force and was not voluntary, LCIC should have embarked upon and made a determination on the facts, whether or not there was a misconduct (before holding that the employee's dismissal was without just cause and excuse) which the LCIC failed to do in this case; and

(c) the LCIC had on his own raised and dealt with the complaint as if it was a 'constructive dismissal' case, where this was never the employee's pleaded case and accordingly the LCIC in coming to his conclusion had adopted the wrong approach and/or had exceeded the terms of the reference before him.

THE APPLICANT'S CONTENTION: RESIGNATION ON 30 SEPTEMBER 2005 NOT VOLUNTARILY MADE

[13] The LCIC's conclusion was that the letter of 30 September 2003 was 'not voluntary but due to pressure and threat imposed on him' (employee). The submission of the employer's counsel was that the LCIC had failed to apply the right test or right approach in coming to that conclusion.

[14] I have examined the testimonies of the employee, COW2 and COW3 on record on this issue and also the extensive references to the same made by LCIC in the award itself. It was obvious to me *firstly*, that the conclusion of LCIC was made on evidence that was before the Industrial Court and not capriciously. It was not for this court to delve into the sufficiency or adequacy of the evidence or whether the decision itself was fair or reasonable. It was not as if that finding of fact in this instant case was completely unsupported by evidence.

[15] *Secondly*, the LCIC did not ignore the right test or considerations

usually applied in undertaking the determination of such an issue as to the voluntariness of a disputed 'resignation'. The LCIC, in my opinion, asked all the right questions in this case.

The LCIC made reference to a relevant principle to be considered in such a controversy as was here, namely as laid down in *Malayan Banking v Chan Hock Low* [2007] 4 ILR 203 in the following passage:

> … the *contents* of the resignation letter should also be taken into account as well as *events preceding and following the sending of the letter* for determining whether the claimant had sent the resignation letter involuntarily.

The letter itself adverted to the fact that it was being submitted on the request of COW3. This was not challenged or rebutted by COW3. There was the further evidence that COW2 had followed the employee and had waited for that letter to be completed and handed in by the employee. These events transpired on the same day, within a matter of two hours of the meeting with COW3, in the late evening of 30 September 2005.

[16] The other relevant principle that called for consideration was the principle of 'causation', namely the necessity for a finding that the impugned 'resignation' was a direct result of a threat against the employee. In *Harpers Trading (M) Sdn Bhd Butterworth v Kesatuan Kebangsaan Pekerja-Pekerja Perdagangan* [1988] 2 ILR 314 the threat was 'resign or be sacked'. The LCIC in this case, in my assessment, identified this correct principle and applied this 'causation' principle. Obviously here the threat was undisputedly 'resign or face a domestic enquiry and be embarrassed'. This amounted to a 'threat' of consequences that the employee would invite upon himself and directly preceded the 'forced resignation'.

Counsel for employer in his submission however laid emphasis on the dicta found the same *Harpers Trading* case — where it was noted:

> … and if the actual causation is not so much the sacking but other accepted considerations in the state of mind of the resigning employee, then it has to be said that he resigned voluntarily because it was beneficial to do so …

This factor (ie it was in the mind of the employee that it was beneficial for the employee to resign) however was not established on evidence by the employer nor did the LCIC appear to have been persuaded that was the case. Prima facie, there was pressure on employer to leave immediately and there was no time accorded to the employer to think through his other options in any event.

[17] Time to consider options was a further critical question to be addressed, namely, whether the employee was allowed time to think over the matter and whether there was some form of protest registered or discoverable from the handing in of the letter of resignation (*Omron Electronic Sales and Services Sdn*

Bhd v Phoon Wai Kit & Anor [2010] 7 CLJ 372). The evidence as alluded to earlier, here pointed to a 'rushed' scenario where the employee was left with no option but submit the letter and vacate the rooms he occupied within that same evening. The employee's letter of resignation itself expressly qualified that it was being handed in at the request of COW3.

[18] In the result, I could not find any grounds to default the LCIC on his conclusion on the first issue, namely that the employee's 'resignation' was not voluntarily made. The conclusion of the LCIC was indeed reached on the totality of the evidence after weighing all evidence, (*Food Specialties (M) Sdn Bhd v M Halim Manaf* [1992] 2 ILR 311) and there was no surrounding illegality or irrationality in reaching that conclusion.

THE APPLICANT'S CONTENTION: THE LCIC SHOULD HAVE EMBARKED UPON A CRITICAL ANALYSIS OF THE EVIDENCE AND SHOULD HAVE MADE A FINDING OF 'MISCONDUCT' BEFORE CONCLUDING THAT THE EMPLOYEE HAD BEEN DISMISSED 'WITHOUT JUST CAUSE OR EXCUSE'

[19] The line of argument put forward for the employer here was that it was not enough to just conclude that the 'resignation' was not voluntarily made. It was still incumbent upon the LCIC to enter into an evaluation and assessment of the evidence led before the Industrial Court and make a formal determination whether there was or there was not a misconduct' proved on the part of the employee. It was submitted further that it was the pleaded case of the employer, albeit in the alternative, that the employee had committed an act of misconduct and there was just cause and excuse for the employee's dismissal in that circumstances.

Counsel for the employer highlighted this omission and categorised that as constituting 'procedural impropriety' which warranted the whole award being quashed outright. He submitted that unlike the law prevalent in UK, our law did not provide the judicial review court with power to refer this 'issue' (remaining outstanding and undetermined, according to him) to be further deliberated and ruled upon by the Industrial Court.

[20] On first appearance or first reading of the award, it would seem that the LCIC did not enter into a deliberation or had failed to make an express finding on the employer's further contention that the employee had acted in 'conflict of interest' (inconsistent or incompatible with express or implied terms or condition of employment) of his duties to the employer.

[21] Counsel for the employee pointed out that this line of attack on the LCIC and the award adopted by counsel for employer, however completely

overlooked the unequivocal concession made by COW3 (the CEO) in his testimony at the Industrial Court that the employer was prepared to 'reinstate' the employee to his previous position and further that the employer had no intention to set up any disciplinary inquiry even at the outset (the meeting on 30 September 2005).

That part of the record of the COW3 evidence in court is reproduced here (at pp 339–340 exh CMS12: encl 2):

> The purpose I called the Claimant, as superior I put all my effort to develop a person, I hope the Claimant could understand and do his work as Professional Manager. All the while the Claimant was good worker. I hope the Claimant could think properly to become good worker. He asked me about the reason what's wrong of opening the Company. I told him if he wanted to know, he has to follow the proper procedure and *I didn't have any intent to set up the D.I.*
>
> I told him I suspect he has a conflict interest in business, (if) you want to do a business, you can be a successful businessman. But if you want to work with the Company, you must work professional then I stopped. The Claimant asked me what do I do wrong. I told him 'ikut procedure proper kalau dia tahu sebabnya'. After that I told him to think it over.
>
> Say a tidak berniat untuk membawa di ke D.I dia boleh kerja.
>
> *Saya sekarang tawarkan kerja balik kepada Claimant dengan gaji dan kedudukan yang sama.*

Counsel for employee also pointed out that the aforesaid testimony on behalf of the employer was made without any compulsion or pressure on COW3 (contrary to what was attempted to be made out by counsel for the employer).

It is also necessary here to pause and take note of COW3's testimony in his witness statement (evidence-in-chief) which on record was as follows:

> The Claimant then asked me what had he done wrong, to which I replied if the Claimant wanted to know the reason, the proper procedure of a Domestic Inquiry must be carried out.

[22] I agreed with counsel for the employee that in the light of that direct acknowledgement that:

(a) there was no intention to institute disciplinary inquiry proceedings; and

(b) the employer was willing to reinstate the employee to his previous position

there could not have conceivably arisen any doubt or dispute any longer that the employer was conceding that the employee's 'dismissal' (or to be more accurate, the employee's forced cessation of employment), was without just cause and excuse.

[23] In the light of this concession, the pertinent question to be asked was,

whether it was then necessary at all for the LCIC to embark upon a minute and detailed analysis of the material before the court and to rule that there was no misconduct on the part of the employee? I should think not. Such a concession willingly made by COW3 to the effect the employer would reinstate the employee was sufficient in my assessment, for the LCIC to hold that the employee's 'dismissal' (following the finding that he resignation' of 30 September 2005 was not voluntarily made) was without just cause and excuse.

The omission to record whether any misconduct' had or had not been established by the employer on the evidence was not in any event fatal to the proceedings nor did it detract from the fact that it was the employer who by that concession by COW3 had themselves chosen to abandon that line of attack that there was misconduct' on the part of the employee which warranted dismissal … There was, in my assessment, absolutely no need for a determination of the allegations of 'conflict of interest' canvassed by employer against employee in the circumstances as highlighted in this case.

[24] There was accordingly, no procedural impropriety in this case and there was rational and cogent basis for the LCIC to come to the conclusion as he did that the dismissal of the employee was without just cause and excuse.

THE APPLICANT'S CONTENTION: THE LCIC MISDIRECTED HIMSELF WHEN HE TREATED THE EMPLOYEE'S CASE AS ONE OF 'CONSTRUCTIVE DISMISSAL' WHEN THAT WAS NOT THE PLEADED CASE OR COMPLAINT BEFORE THE INDUSTRIAL COURT

[25] From repeated readings by me of the award, I could not find any support for the contention of the employer's counsel that in coming to his conclusions in the award, the LCIC had exceeded his jurisdiction and/or the terms of the reference of this particular case, by applying 'constructive dismissal' test to reach the LCIC's conclusion.

I could only find one reference in the award to the phrase 'constructively dismissed'. This occurred where the LCIC identified in the award:

> The Issue
>
> 1. Whether the Claimant voluntarily resigned or the Claimant being constructively dismissed by the Company.

Save for that reference, I could not find any evidence that the LCIC had misdirected himself as to the proper questions to be asked in the circumstances of the facts obtaining in this case.

[26] The LCIC's reference in the award to *Wong Chee Hong v Cathay*

Organisation (M) Sdn Bhd [1988] 1 MLJ 92; [1988] 1 CLJ 298, the (locus classicus on the subject of 'constructive dismissal') was merely to lay stress on the further principle of law therein affirmed in that case, namely that, if the (claimant/employee) succeeded in showing that he was dismissed, it was for the respondent company to show that the dismissal was with a just cause or excuse. (This principle was also affirmed in the Court of Appeal decision in *Weltex Knitwear Industries Sdn Bhd v Law Kar Toy & Anor* [1998] 7 MLJ 359 also cited by the LCIC in the award).

There can be no quarrel with that principle of law.

Apart from that there was nothing shown in the award to support the employer's counsel's submission as it would appear, that the LCIC was sidetracked and dealt with this reference before the Industrial Court, as if it was a 'constructive dismissal' complaint.

[27] In my assessment, this contention of the employer that LCIC had exceeded his jurisdiction in issuing the award was wholly misconceived and devoid of any merits.

CONCLUSION

[28] Accordingly, I found that there was no ground whatsoever established by or for the employer (the applicant) for this court to exercise its powers of curial intervention in this case. There were no errors of fact or law committed by LCIC. The conclusion reached was reasonable in the light of evidence and testimony of witnesses in the proceedings at the Industrial Court. The finding of LCIC or the process in which the LCIC came to his conclusions was not, in my evaluation, tainted by any irrationality or procedural impropriety, such as to entitle the employer to quash the award.

[29] The application was therefore dismissed with costs.

Application dismissed with costs.

Reported by Kohila Nesan